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SUPREME COURT U.S.

Supreme Court of the United States

OCTOBER TERM, A. D. 1902.

No. 56.

GERTRUDE H. HARDIN and THE COOK COUNTY CANAL AND DOCK COMPANY, *Plaintiffs in Error,*

vs.

CHARLES B. SHEDD.

In Error to the Supreme Court of the State of Illinois.

PETITION FOR REHEARING.

THOMAS DENT,
For Petitioners.

BARNARD & MILLER PRINT CHICAGO

IN THE

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CHARLES B. SHEDD, *Defendant in Error.*

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PETITION FOR REHEARING.

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The plaintiffs in error respectfully apply for a rehearing herein, and as grounds therefor state the following:

Full and absolute proprietary title was in the United states, without any distinction, so far as the title was concerned, between the land next to the water and the land submerged with water.

Such title was subject to the power of Congress alone.

Gibson v. *Chauteau,* 13 Wal., 92.

Being full and absolute, it was not subject to qualification by the State of Illinois, nor by any decision of the courts of that state.

Where patents making no exception or reservation were granted by the United States it was not within the power of the state, nor of the state court, to ingraft therein, by construction or otherwise, any such exception or reservation, nor indeed any qualification.

The United States alone, in the exercise of the powers conferred by Congress, could give title, and the exercise of the power to do so was exclusively a Federal power.

Irvine v. *Marshall*, 20 How., 558.

When the question arose whether the title to the lake bed once fully belonging to the United States had passed that question was to be resolved by the laws of the United States.

Wilcox v. *Jackson* (*or McConnell*), 13 Pet., 498.

Paige v. *Peters*, 70 Wis., 178, 182.

In construing patents from the United States, or determining as to the effect of the same, this court is the higher and ultimate authority.

Gilmore v. *Sapp*, 100 Ill., 297, 303.

The closing remarks of Mr. Justice CATRON, in speaking for the court in *Jourdan* v. *Barrett*, 4 How., 169, 185, at the close of the opinion, are eminently fitting, as applicable to this subject, and it is hoped they will be observed in this connection without further citation.

And this court has a revisory power when a claim of title is made under such patents, and is denied by a state court; and such revisory power cannot be taken away nor be qualified by the state court nor by any of its decisions.

The lake bed could not pass except by the patents, and did not pass by the Swamp Land Act.

The inaccuracy of using the words "Navigable Lake" on the plat could be shown, and was shown most conclusively in the litigation. It is throughout recognized as a misnomer or mistake, and no consequence adverse to the rights of the undersigned can justly be assigned to such mistake.

Hardin v. *Jordan, supra.*

Stringer v. *Lessee of Young*, 3 Pet., 320; s. c., 7 Law Ed., 693.

I.

A title was set up by the plaintiffs in error under patents from the United States, as embracing submerged lands or a part of the lake bed of a non-navigable lake bounding the lands patented. Such title was denied by the state court, and the patents were construed as giving title only to the water's edge of the lake, and not as including land under the water; this being by such court claimed for the state. This court now says that the state court having so pronounced itself, though somewhat timidly, and guardedly in this case, yet more distinctly in the later case of *Hammond* v. *Shepard*, 186 Ill., 235, "the law of Illinois" has been thus settled. Such conclusion is grounded upon a theory as to the potency of "state law" which "has become established almost without argument."

But was it within the province and unreviewable power of the state court thus to make the law to govern the patents from the United States?

Before answering this question the course of proceeding, as bearing on the question what authority, as between the courts, is the higher, as having the ultimate right of final decision, may be recalled.

The holding of the state court was based on the ground that the lake was a meandered lake, that is to say, that it was meandered in the public surveys under which the title was to pass from the United States. The court did not hold that the meander of the lake, as a line which in surveying was run from point to point, and might be surveyed again, constituted in itself a boundary. The court could not do so consistently with its prior rulings. It was found, as has always been found in every instance of investigation, that the body of water included within the survey of the township was a lake which was in fact non-navigable. (161 Ill., 473.) The question what was the common law doctrine in such cases was admitted by the state court to be a proper, and, indeed, the controlling question, and, coming to that point, the court inquired whether the rule in respect to boundaries should be held to be similar in the case of lands on a non-navigable lake to what the court itself had held it would be in the case of even a meandered river as a boundary; and in this particular the court, in its opinion by Mr. Justice Phillips, resolved that it would determine for itself that the common law on the subject had, as to lakes in Illinois as contradistinguished from rivers, been properly announced in *Trustees of Schools* v. *Schroll*, 120 Ill., 509. And, therefore, the court chose to say that, as to all meandered lakes alike, whether large or small, placing the same on the same footing as Lake Michigan, it would adhere to an expression made in the case last mentioned, notwithstanding the decisions of this court to the contrary in *Hardin* v. *Jordan*, 140 U. S., 371, and *Mitchell* v. *Smale*, 140 U. S., 406, upon the identical question and in regard to the same lake of which in particular the Supreme Court of the state was speaking.

This court, it should be especially observed, had particularly considered what was the common law in respect to a non-navigable lake meandered in the public surveys. The Supreme Court of the state had not considered it in the case of *Trustees of Schools* v. *Schroll, supra,* as to a patent from the United States, and was not actually called upon to consider it there.

But, as before remarked, the Supreme Court of the state, in the present case, took the position that it was authorized to determine conclusively as against patentees from the United States the construction which should be put upon the patents in respect to lands bounded by lakes, not only those which were navigable, but also as to all meandered lakes, "regardless of the question whether or not they were navigable"; the court further holding that "so long as such meandered lakes exist, over their waters and bed when covered with water, the state exercises control, and holds the same in trust for all the people, who alike have benefit thereof in fishing, boating and the like." (161 Ill., 493.)

These citations from the opinion in the state court in this case are repeated to the end that the fact may be kept in view that the court denied title or proprietary right in the patentees as to the lake, notwithstanding it was conceded that the lake was the property of the United States when it sold and conveyed the lands bordering thereon *without any reservation of the lake,* and notwithstanding the fact that the state could not claim title by way of sovereignty.

The ultimate holding of the court as to the title to the lake being in the state was expressly put on the ground of the policy of the state, especially in later years, a policy which it was thought would be subserved better by not

giving over to the proprietors anything from meandered lakes, small or large, except accretions, as a recognition, not of title, but of a riparian interest in the body of water constituting the boundary. The view of the state court as to the common law will, however, be presently noted further. But on that subject, "Policy," it would seem, suggested itself to the state court as bearing on its right to say whether the common law was, as this court had found it to be, in harmony with the practice which had always prevailed under patents from the United States for land bounded by non-navigable waters within the public domain in not charging for the submerged land, but treating the body of water as a boundary.

This court now declares that in *Hardin* v. *Jordan* and *Mitchell* v. *Smale*, *supra*, this court ascertained "what the local law was," and decided "that the abutting lot owners took to the center of the lake." But this court chooses to put aside that ascertainment, and consequent judgment, and, instead of abiding thereby, to turn to and accept as the unquestionable law of the case the opinion of the Supreme Court of the state in the present case, as construed, it may be, by the later case of *Hammond* v. *Shepard*, *supra*. Looking, therefore, to these decisions of the state court as a higher and better determination of the local law than previously existed, either before or after the decision of this court in *Hardin* v. *Jordan*, this court finds that under such decisions of the state court, adverse in this regard to the decisions of this court, the patents from the United States describing certain tracts bounded on a non-navigable lake, "do not carry adjoining land below the water line." (Opinion by Mr. Justice Holmes, p. 2.)

According to such ruling the effect of the patents "to

private persons" is, as is stated in the dissenting opinion of Mr. Justice White (p. 1), "to transfer the title of the bed of the lake to the State of Illinois."

This court, according to its present opinion, makes no question as to which court, whether this or the state court, has a prerogative right to construe the patents, but only looks to the question what was meant by the Supreme Court of the state in the opinion in the present case, and in the later case of *Hammond* v. *Shepard, supra.* Reading the two cases together, this court concludes that it has been made "clear * * * that conveyances of the upland do not carry adjoining land below the water line." The court follows these decisions because it is said, "it has become established, *almost without argument,* that the effect of a grant from the United States on the title to adjoining submerged land will be determined by the law of the state where the land lies."

In the opinion of the court by Mr. Justice Holmes (p. 2), as applied to lands under navigable water, the proprietary right of a state in its sovereign capacity is recognized as something distinct from the principles governing this case; and it is said, "as to conveyances bounded by non-navigable lakes," it is not meant that the land under such water also "passed to the state on its admission or otherwise, apart from the Swamp aLnd Act, but (the doctrine accepted as the local law in this case) "is simply a convenient, possibly the most convenient, way of determining the effect of a grant."

What does this mean but that the state court could be its chooser, and whatever interest, even of a proprietary character, it should claim for the state would be yielded to it by this court?

The incongruity of holding that a government patent

granting a tract of land bounded by non-navigable water should be construed as conveying to the patentee upland, while it conveys to the state the water and submerged bed, if the state chooses to take that position, is supposed to be avoided, if we understand the position of the court, by deciding that it is convenient to determine that this is the effect of the grant.

If your Honors please, may we pause for a moment to consider what is said to have become established "almost without argument"?

One thing thus allowed so readily, and as if without any challenge, is, that each state may take all non-navigable lakes within its boundaries as soon as the lands abutting thereon are conveyed by the United States to private owners. The decision of the State Court refers to meandered lakes, but actually applies to most lakes as soon as surveyed or meandered. What is this but declaring that the patents can, as to the lands submerged by such bodies of water, be construed conclusively by the state courts without any revisory power being left to this court? Is it really different from holding that, as to all patents granting lands bounded by such bodies of water, the courts of any state in which such bodies are can freely and absolutely determine that such bodies of water belong to the state? Or, again, what is it but to decide, as before suggested, that a patent shall have the double construction, *if the state court so chooses,* of giving to the grantee named therein upland, but giving to the state the body of water referred to as a boundary, with the bed thereof? The admission that it belonged to the United States and might be sectionized and sold is given away by the construction allowed to the state court, of determining of

its own volition, that the state takes it independently of any grant to itself. Is it a good answer to say, in reference to such a surrender of property and prerogative to the states, respectively, that "the United States assumes the position of a private owner, subject to the general law of the state so far as its conveyances are concerned"? The conclusion certainly is that whatever the state court chose to determine was and is the positive and unquestionable law; this court not only accepting the determination of the state courts, but surrendering all controlling thought or power, except to see that the state court did, for some reason or other, or with reference to an arbitrary power on its part, so declare or determine.

It is equivalent to a declaration that no federal question can arise if a state court, construing a government patent for land bounded by water, chooses to construe such patent as giving upland only to the patentee, but to the state a proprietary right to the land under the water. It is likewise a declaration that the state is free to take the property of the United States, or grantee of the same, by way of construing a land patent to a private individual, and that this court is powerless to prevent such a consummation.

It is to be premised, and will doubtless be conceded, that, aside from public or navigable bodies of water, title to real estate in the former Northwest Territory must be traced from the United States, and that this must be by Congressional grant or patents issued in pursuance of the acts of Congress, and not from the acts of government surveyors or other officials not authorized to issue patents. (*State of Iowa* v. *Rood*, —— U. S., ——. Opinion filed Nov. 18, 1902.)

Although the writ of error in the case last mentioned

was dismissed on a question of jurisdiction, the enlightened judge who declared the judgment of this court truly distinguished between questions of title by virtue of sovereignty of the state and title deducible from government sales and grants, and held that what was shown to have been done by surveying and meandering the lake, and in the approval by the Commissioner of the General Land Office of such survey of the lake, including the meander thereof, could not be said to segregate such lake, nor transfer that part of the public domain to the state.

The paramount power, and consequent duty of this court, to be guided by the laws of the United States, and not by any state court decision in determining as to land titles proceeding from the United States, were recognized in that case.

II.

It is to be noticed that the decision of this court in *Hardin* v. *Jordan*, followed by *Mitchell* v. *Smale*, was expressly an exposition of the common law.

The court, by Mr. Justice Bradley, declared that the common law "is the true and only law of Illinois on the subject of land titles, and especially as to the rights of the riparian owners and the construction of deeds and grants of land bounded by streams and permanent bodies of water, except the great navigable lakes." (384-6.) The court had quoted from a leading Illinois case a statement declaring: "We feel bound * * * so to construe grants by the government according to the principles of the common law, unless the government has done some act to qualify or exclude the right." (*Hardin* v. *Jordan*, 140 U. S., 384-6, at p. 384.)

In the argument at the bar it was assumed that this case was governed by the common law; and, on the part of the undersigned, it was thought to be unnecessary to reargue the matter when it had been so well and vigorously maintained and expounded by this court in *Hardin* v. *Jordan*. It was considered to be enough, in that regard, to specify some additional authorities expository of the common law doctrine, and, while distinguishing between navigable and non-navigable waters, to show the approval by the state court itself of the legal position that the meander line (so called) was not a boundary. (Rec., 439.) But authorities from various sources were cited to show, as per example at pages 99-103 of the first or principal brief for the plaintiffs in error, that, as was stated by Mr. Justice Gray in *Paine* v. *Woods*, 108 Mass., 160-169, "*the general rule of construction of all grants of land bounded by water of any kind is now well established, that, unless qualified by restrictive words, they pass the soil towards the center of the water* as far as the grantor owns." Nor were such pertinent authorities in this line of decision as *Middleton* v. *Pritchard*, 3 Scam., 510; S. C., 38 Am. Dec., 113; *Canal Trustees* v. *Haven*, 5 Gilman, 548; 3 Kent's Com., *428; Elphinstone on Deeds, *182-3; *Shell* v. *Matteson*, 81 Minn., 38; S. C., 83 N. W., 491—a case as to a lake east of the Mississippi, and, therefore, in the former Northwest Territory—omitted in the references.

The expression, "the law of the state in which the lands lie," in view of the use, not now made of it, as being, like the law of the Medes and Persians, unrepealable, was, to say the least of it, unfortunate. It was inapplicable to any patent for public lands further than it might be applied in respect to boundaries in the case of navigable waters,

as applying to ownership as between the state and private individuals of the beds thereof, or might refer to cases where the state was the primary source of title, or made the particular grant construed. In cases concerning government grants, or patents for a part of the public domain, in a region governed by the common law, and embracing non-navigable waters bounding the patented tracts, the true and only question was and is as to the bearing thereon of the common law, or whether an exception has been made in the grant itself, *or by the proper legislative authority having the right to fix at the time of ownership of the property a special status of the same to govern and be considered in the construction of a grant.*

It was the question what was the common law which was argued in *Hardin* v. *Jordan*. Although the court did not deem it necessary to go back of the Statute of Illinois of February 4, 1819 (Revised Code of Illinois, 1829, p. 102), adopting the common law, yet in point of fact Mr. Justice Bradley, in delivering the opinion of the court, referred to the earlier Statute of Virginia, to the same effect, which statute applied to that state and all its outlying territory northwest of the river Ohio. Such Statute of Virginia is cited in *Scott* v. *Lunt's Administrator*, 7th Peters, 596-605. Hence, the true question was how the patents should be construed according to the common law, which was the law in this regard in the whole territory which was ceded by Virginia to the United States; and it was to this question that this court, speaking by Mr. Justice Bradley, addressed itself in determining what was the law of the case, which, however, was but incidentally spoken of as "the local law of the State of Illinois."

It must be evident that the investigation had reference

to the ascertainment of the common law, and not to the question whether any law of the State of Illinois could operate upon or affect the construction of the patent.

It has been entirely appropriate in various instances to refer to "the law of the state where the land lies," and make that law the controlling factor in the construction of conveyances. Such was the case in "*Shively* v. *Bowlby*, 152 U. S., 1, 45; *Grand Rapids & Indiana R. R. Co.* v. *Butler*, 159 U. S., 87, 90, 93; *St. Anthony Falls Water Power Co.* v. *St. Paul Water Commissioners*, 168 U. S., 349, 363," referred to in the opinion in this case, since those cases concerned navigable waters. The expression was appropriate, also, in various other cases pertaining to navigable waters. But it was not a fortunate expression in instances relative to non-navigable waters, in respect to which grants from the United States of territory controlled by the common law are or have been the subject of construction; not fortunate, in that it might be *misapplied* as authorizing the overruling of the common law if a state court, actuated by state pride or supposed policy, should choose to adopt an unfortunate expression of its own, made without regard to the common law, and entirely ignoring the common law. Such expression, first made without argument, even if appropriate in the first case of its use, would thus be made an excuse for adhering to an erroneous suggestion, which again would be followed without specially considering its reasonableness; an error perpetuating error.

There are various other cases in which the expression was and is quite appropriate; such cases, for example, as pertain to grants from the older states from which primary titles proceeded. This also may be said, in various instances, as to the construction of grants from the states

based on titles from the states as owners under grants of school lands or patents for swamp lands. Each state may, in most instances determine through its courts the construction of grants not proceeding from the United States; and, generally speaking, the decisions of the state courts in such instances will not be reviewable here, because of not presenting any federal question. In point of fact, this seems to have been the character of *Trustees of Schools* v. *Schroll*, 120 Ill., 509; for in that case the trustees of schools had made a plat of Section 16, and the question was raised as to how the deed or conveyance of lots *represented on that plat* should, *if the lots conveyed had appeared to be bounded by a lake*, be construed. No federal question was involved; and the court did not find that the grant by the state was of land bordering on the lake, which lake had passed to the State of Illinois, by the Enabling Act, and was subject to be granted by the state, or *trustees of schools*, as representatives thereof.

It is intended herein to submit to your Honors the proposition that the common law prevailed in respect to the grants from the United States under consideration, and that no mistake in this regard was heretofore made by this court in so holding. It is also intended to say that even a statute of the state, if there were any such, could not control in the construction of the patents from the government, and, moreover, that the state court could not itself make any law to govern in such construction.

It is not forgotten that upon the question what is the common law, "decisions of the courts of justice contained in * * * the reports of Judicial Decisions," and also treatises of learned men expository of the decisions, should have weight or authority; but it is respectfully maintained that this court had at the time of the decision

of *Hardin* v. *Jordan*, and still has, a paramount right to construe and determine the effect of the grants under consideration, and that no expression made here or elsewhere as to the "law of the state" should have the effect of rendering the decision of this court inoperative, or of taking away its force.

Besides this, neither the courts in Illinois, nor in any of the states wherein the common law prevailed over territory belonging to the United States, could change that law so as to affect or qualify a grant from the United States. In all such states "a grant of public land of the United States carries with it the common law rights to an innavigable stream thereon (and we may add, a non-navigable body of water referred to as a boundary), unless the waters are expressly or impliedly reserved by the terms of the patents or of the statute granting the land, or unless they are reserved by the Congressional legislation authorizing the patent or other muniment of title." (*Lux* v. *Haggin*, 69 Cal., 255; S. C., 10 Pac. Rep., 751.) "Neither the state Legislature nor the state courts have any independent power to interfere with the primary disposal of the public lands of the United States, nor to detract from the estates in such lands granted under the laws of the United States." (*Id.*, 10 Pac. Rep., 745.)

The latter proposition is but in accord with the provision in the Ordinance of 1787, declaring that "the Legislatures of the districts, or in states which might be formed out of (the territory of the United States northwest of the river Ohio) should never interfere with the primary disposal of the soil by the United States in Congress assembled, nor with any regulations Congress might find necessary for securing the title in such soil to the *bona fide* purchasers." (Art. IV. of said

Ordinance.) This restraint was generally laid on the new states in the several enabling acts providing for their admission into the Union.

The common law prevailed in the territory before the cession was made by Virginia, and thereafter continued to prevail in respect to the whole territory while in the hands of the United States, and consequently as to the titles given by the United States, and it should always be maintained, unless in any instance qualified by the grants or patents. To this statement is to be added the observation that there is a branch of the common law that for the most part settles the manner and form of acquiring and transferring property. (1st Bl. Com., 67.) Or, as stated by another author, the common law in one of its branches "declares the principles applicable to the expounding of wills, deeds and acts of parliament." (Broom's Commentaries on Common Law, *8.)

The anomaly of disregard by the Supreme Court of the state, not only of the decisions of this court on the precise question, but also of the decisions in England, Ohio, Michigan, Indiana and Minnesota, as well as in New York, New Jersey and other states, in reference to the common law, is startling, and should not receive encouragement.

A departure from the common law in the manner indicated will doubtless be rife with fresh and almost unending litigation, and work incalculable damage.

It will, of course, be remembered that in *Hardin* v. *Jordan* it was appropriate enough to discuss the Illinois cases supposed to be based upon the common law, and especially cases where bodies of water bounded tracts meandered in the public surveys; but no concession

that the state court could itself, and contrary to the weight of authority, make the law, can fairly be deduced from such discussion or use of cases.

It should not be overlooked that not only did the state court, in *Trustees of Schools* v. *Schroll*, make observations not necessary to the judgment, in disregard of its earlier expressions on the subject, some of which were cited in *Hardin* v. *Jordan*, but also that the state court now, in choosing to adhere to such observations, plants itself upon a theory that ignores or obliterates the distinction between navigable and non-navigable waters, and attributes to the meander of the lake an effect which could not, under the law as laid down by itself, nor under the law as repeatedly laid down by this court, be given to it. Nor should it be forgotten that the state court conceded that "the question * * * as to private rights must be determined by settling the rights of the parties under the patents issued on the two surveys" (161 Ill., 492), referring to the original survey of 1834-5, and to the survey of the lake bed in 1874. Nor should the fact be overlooked that the state court did not in any way show how title to any part of the property could pass to the State of Illinois, but conceded preliminarily that it did not pass by the Swamp Land Act, and that the adjudication to that effect as against the state and as against the County of Cook by the Land Department, was and remained binding (*Id.*, 490-492), all going to show that the State of Illinois could only have taken title, if any, by virtue of a grant from the United States. Other or further than this, the sole consideration upon which the court proceeded was that it found a body of water which was meandered in the public survey.

Thus, in considering whether the state took title, nothing whatever was presented as argument or suggestion in support of any grant to the state, unless we be required to accept some supposition to that effect from the fact that the court *assumed the right to treat the lake as a public or navigable body of water because it was meandered*, giving the same effect to the meandering of the lake that would have followed from an act of Congress declaring that every meandered lake should be held to be a navigable body of water, a declaration that would have been repudiated by Congress.

Neither will it be forgotten that if the decision of the state court in this regard be permitted to stand, the state has been made the final judge, through that tribunal, not only of the supposed matter of policy, but in a matter of title which is asserted for the state by the court itself.

While the Supreme Court of the state, speaking through Mr. Justice Phillips, intimated that in some cases in other states an opinion similar to a doctrine expressed in *Trustees of Schools* v. *Schroll* had been maintained without being predicated on the Colonial Ordinances of Massachusetts, and, therefore, might be said to be based on the principles of the common law, yet such cases will be found to be distinguishable from *Hardin* v. *Jordan* and *Mitchell* v. *Smale*, as not being expressed to have reference to the common law, but in nearly, if not quite all instances, traceable to constructions of conveyances other than patents from the United States, and not presenting any federal question.

The central and pivotal feature of *Hardin* v. *Jordan* was the consideration of the common law, as governing the case, not, however, overlooking what had been the practice of the United States in the survey

and sales of the public lands, but, on the contrary, showing that such practice conformed to the general principles of the common law as to the constuction of deeds and grants for lands bounded by water, "no charge being made," under such practice from the origin of the government, "for the bed of the stream or other body of water," even when meandered (140 U. S., 371); the waters themselves, under such practice, having been considered to "constitute the real boundaries."

The dissent of the state court was not from denying that such had been the practice of the government, but in an assertion that the state court could itself, and in opposition to this court, declare what was the common law, on the supposition that the policy of the state would be promoted by adhering to a former expression of the same court on the subject. Hence, it may be said that the decision of the Supreme Court of the state did not assume to disregard the common law, but rather to make it for the case, as if it was something to put on or off, at will, "for convenience"; as to which see, in passing, the principal Brief for the plaintiffs in error herein, pages 103-104, 130-137.

III.

AS TO THE SWAMP-LAND GRANT, TO WHICH VARIOUS REFERENCES ARE MADE IN THE OPINION OF THIS COURT BY MR. JUSTICE HOLMES.

The opinion observes that the patent to Holbrook, embracing an important part of Mrs. Hardin's holdings was dated May 20, 1841, "long before the Swamp-Land Act." The opinion then states that, "at that time the land under the lake, as well as that surrounding it, be-

longed to the United States." The opinion thereupon holds that "if grants of the United States should be construed without regard to state laws, it may be assumed that, subject to all questions of the proper adjustment of lines, Hardin would have prevailed."

Pausing for a moment while mentally questioning what is meant by "state laws," a general disclaimer for the plaintiffs in error of any opposition to state laws must be interposed; and the counsel whose name is to appear as their representative would express the hope that the recording angel will not add to the many sins for which he must answer the charge of using the phrase, "the law of the state where the land lies," or other similar phrase, as furnishing the rule for construing patents from the United States for public lands in the former Northwest Territory.

But as it seems necessary to keep in mind other observations in the opinion by Mr. Justice HOLMES, referring to the Swamp-Land Act, the two later passages making such reference will, for convenience, be herein quoted:

> "The rule as to conveyances bounded on non-navigable lakes does not mean that the land under such water also passed to the state on its admission or otherwise, apart from the Swamp-Land Act, but is simply a convenient, possibly the most covenient, way of determining the effect of a grant." * * * "Of course, it would result from the Illinois ruling (referring to the decision in this case and in *Hammond* v. *Shepard*), that the survey of the submerged land in 1874, referred to in *Hardin* v. *Jordan*, and the conveyances in pursuance of it, may have been good on the Illinois side of the state line, unless the State had got a title before that date under the Swamp-Land Act."

Confining observation for the present to the legal situation of the lake with reference to the Swamp-Land Act, it is to be remarked that although the opinion by Mr. Justice Holmes added to the latter quotation a statement that, "it is unnecessary to consider in this case" whether the state did get a title under the Swamp-Land Act before the survey of the lake in 1874, yet the various allusions to the Swamp-Land Act, as well as to the survey of 1874, as indicating a possibility of vital force in one or both of them, as calculated to affect the rights of the plaintiffs in error, should not remain unnoticed. They are in every point of view of great significance.

Is it not enough in respect to the survey of 1874, to find that the Supreme Court of Illinois in the present case agreed perfectly with this court that such survey was null and void, and that the United States could not after having sold the lands bordering on the lake sectionize the lake and sell it over again? The difference between the Supreme Court of Illinois and this court, as this court will recall, had reference merely to the question whether the patentees from the United States of the lands bounded by the lake took full title to all the submerged land and had a right to portions of the lake subject to be specifically determined, according to well established rules, or took by virtue of the patents only riparian rights, giving them, as the Supreme Court of the state held, the land only to the water's edge, but a right to follow the water if it should recede; not the certain boundaries to which this court had declared them to be entitled, but merely a shifting or uncertain boundary.

But there cannot be a shadow of reason for supposing that the State of Illinois took title to the lake by virtue of the Swamp-Land Act.

The terms of the act itself, and all the circumstances applicable to the question, would fully negative any authority of the state to claim title to the lake under that act.

In the first place, some of the land which was situated on the lake had been sold by the United States before the passage of the act, a fact expressed in the opinion by Mr. Justice Holmes. Besides this, an act earlier than the Swamp-Land Act was passed by Congress, such earlier act being that of September 20, 1850, giving to the State of Illinois the right of way through that state for the construction of a railroad which was to run from Chicago, Illinois, to Mobile, Alabama, which railroad is now known as the Illinois Central Railroad. For the purpose of aiding in the making of the railroad and its branches, the act granted every alternate section of land designated by even numbers for six miles on each side of the road and branches, and further made provision that the uneven numbered sections or parts thereof not granted should not be sold for less than double the minimum price of the public lands, that is to say, for not less than $2.50 per acre. Under this act it may be observed by the court upon looking at the copy of the government plat inserted in the record between pages 60 and 61, all the parts of Sections 20 and 32 remaining unentered at the passage of the act were selected by the railroad company, the letters, "C. & M. R. R.," meaning the Chicago & Mobile Railroad, now the Illinois Central. The tract entered by Stephen A. Douglas May 8, 1855, and now held by defendant in error Shedd (see Rec., 59, as to Patent Certificate), was probably the only tract that remained subject to entry at the time of the passage of the Swamp-Land Act, the date of the entry by William B. Egan not appearing from the record in this case.

It is not improbable that after the passage of the act in aid of the railroad there was an order withdrawing from a right of selection under the Swamp-Land Act the land in this particular locality, the price of such other lands having been advanced by the Act of September 20, 1850. (There is hardly time in making the present writing to make search for such probable order.)

But there are still other reasons why the Swamp-Land Act would be out of consideration, either as a suggestion that some "legal subdivision" *might have been claimed thereunder*, or as a foundation for objection to the title of the plaintiffs in error. One such reason is that the Swamp-Land Act provided only for the selection of legal subdivisions, the "greater part" of which were of land "wet and unfit for cultivation." The act did not provide for the selection of lakes. As before remarked, it applied to "legal subdivisions," and contemplated action under surveys, which, in the main, had been made many years prior to the passage of the act. In the case of the fractional township under consideration, the survey of the township was completed as early as 1835. This is noted here because it would seem that some misapprehension has arisen in regard to the course pursued in disposing of the public lands. All the section lines were run to the lake, and corners to each fraction bordering the lake were established in making the survey, and the meander had reference only to the quantity of the fractional parts of sections or smaller legal subdivisions bordering on it. When the survey was made it was the custom of the government to have surveys made under contract to include a number of townships. (American Almanac 1832, 145-147, Article entitled, "Public Lands.")

After the survey of the township the surveyors returned to the Surveyor General the field notes of the survey of each township together with a plat, and from such field notes the Surveyor General tried the accuracy of the plat and made calculations of the quantity of land in the subdivisions. (*Id.*, 147.) A plat of each township was afterwards prepared by the Surveyor General, one copy of the same for his own office, one for the Register of the proper land office, and a third copy for the Commissioner of the General Land Office at Washington. At some time thereafter a public land sale occurred, and not until after that time were the lands subject to entry. A survey of the township was made once for all, unless found to be in need of correction, and as to this the government, like any proprietor, could make corrections before selling the land, and could re-sectionize parts unsold if re-survey was deemed advisable.

These observations are made, not only to indicate that the survey of the township was complete in 1835, but also to distinguish this case from a contention that arose in some of the Indiana cases, including one as to Wolf Lake, recently decided. In some of those Indiana cases a debate sprang up as to whether there had been a complete survey of a township embracing a lake or lakes. The reason for the debate was, in the first instance, that when the State of Indiana took title to the lands bordering on Beaver Lake, under the Swamp-Land Act, some officials, as if acting under state law giving authority to sell the "Swamp and overflowed lands" then held by the state, conveyed to Dunn & Condit the lands bordering on the lake, describing them as in the patents to the state, and the grantee or grantees of Dunn & Condit then claimed the lake as well as the lands bordering on. it.

This appears in part from *State of Indiana* v. *Milk,* 11 Bissell, 197, which, however, went no farther than a decision by Judge Gresham upon a demurrer to the answer, and was afterwards dismissed without a hearing. But the facts appear more at large in *State of Indiana* v. *Portsmouth Savings Bank,* 106 Ind., 435, where the matter was finally determined. There it appeared, in substance, that the sale to Dunn & Condit was of none other than the upland as measured or estimated under the original government survey; and it was held that the lake did not pass by the conveyance executed by the state or county official to Dunn & Condit, because a survey by the state after acquiring title under the Swamp-Land Act was necessary before selling. Upland, as well as lake, was to be regarded as "swamp-land," yet no part that was formerly lake was to be sold until surveyed, and it was held that the purchasers were chargeable with notice of want of authority on the part of the representative of the state to convey the former lake bed that the *state* had not surveyed after acquiring title through the Swamp-Land Act. The state had taken title to the lake, at the date of that act "swamp and overflowed land," but the state took such title from the United States under the description of the legal subdivisions which had been made by the United States, it being found that the greater part of each of such "legal subdivisions" was "wet and unfit for cultivation"; the former lake thus passing to the state. Such construction, by which the former body of water passed through a conveyance particularly specifying the "legal subdivisions" surrounding it, represented, as we suppose, the practice of the government noted by Mr. Justice Bradley in *Hardin* v. *Jordan,* or, as we may say, and as was there held, being in conformity with the common law.

It is quite true that if the lands surrounding Wolf Lake in Illinois had been unsold by the government at the time of the passage of the Swamp-Land Act, and if the earlier act in aid of the railroad company had not been passed, and if the greater part of any legal subdivision was wet and unfit for cultivation, such legal subdivision might have been claimed by the state, and if listed as swamp land and conveyed by the United States to the state, the conveyance would have carried title to a proportionate part of the lake, and then it would have followed under the Act of Illinois of June 22, 1852, Session Laws of Illinois, 1852, page 178, that the whole, so far as passing to the state, would have been subject to be offered for sale by the County of Cook. But not a single one of the various contingencies necessary to the application of the Swamp-Land Act is believed to have existed so far as lands on the border of Wolf Lake in Illinois were concerned; and there is abundant evidence in this record of good reason for a rejection in the Land Office of the claim of the State and of the County of Cook as its guarantee under the Swamp-Land Act, so far as the submerged land in the former Wolf Lake is concerned. (Rec., 94-5.)

What is said in the opinion by Mr. Justice Holmes, as above quoted, in regard to a form of construction as being "simply a convenient, possibly the most convenient, way of determining the effect of a grant," indicates, it is to be feared, the thought that it was the right of the Supreme Court of the state to adopt a more convenient way of disposing of the principal question involved than was in the opinion of the court by Mr. Justice Bradley in *Hardin* v. *Jordan*, found to be the true legal way. Nor should it be forgotten that this court in the latter case

held that the course therein approved "has been the practice of the government from its origin in disposing of the public lands." (140 U. S., 380.) This matter of looking to mere "convenience," is as if the common law had nothing to do with construction of a patent in such case, or as if the State Court could at its own volition make the law, suiting the action to a word, or to words chosen once or oftener and thereafter followed as being the very substance of a rule "established almost without argument."

The argument *ab inconvenienti*, ought not to pass without such a challenge as may be read from the opinion by Mr. Justice Bradley, 140 U. S., 397-399. The expressions there made have a general pertinency, though there applied to a different proposition.

IV.

As to the words "Navigable Lake," on the plat.

It is remarked as to this in the opinion by Mr. Justice Holmes that the conveyance was by reference to the official plat, and that the plat of the Illinois portion, unlike that of a part in Indiana, described the lake as a "navigable lake." Also that, "It is true that this is a mistake, but it might be urged that the description must be taken to have the same effect as if it were true when we are determining the effect of a conveyance adopting it."

It certainly cannot be said that this matter was overlooked in *Hardin* v. *Jordan*, nor in the present case, reported as *Fuller* v. *Shedd*, and *Hardin* v. *Shedd*. The reports show quite to the reverse of any overlooking of this matter.

The government by the proper officers had admitted over and over again that it was not a navigable lake. The proceedings in 1874, that caused it to be surveyed, were wholly based on the idea that it was not only non-navigable, but that its waters had so receded and evaporated that the submerged lands had become fit for cultivation.

The words "Navigable Lake" on the plat, were not really a description of the lake, they stood merely in the place of a name for the time being, and it was competent to show that they were erroneous. It was about as clearly a mistake as if the surveyor or draftsman had written macadamized road or some similar phrase. The government was not bound by the words "Navigable Lake," any more than if some fanciful name had been used, and in point of fact, it fully discarded those words.

Nor did the State of Illinois claim the lake by virtue of sovereignty. Everybody conceded that the lake was non-navigable. Nobody claimed at that time that it was navigable when surveyed. As was remarked in *Hardin* v. *Jordan*, 140 U. S., 380, "the lake, * * * was marked with the words 'navigable lake,' although the fact found by the court is that the lake was not and is not a navigable lake, but a non-navigable fresh water lake or pond. The patent itself does not contain all the particulars of the survey, but the grant of the lands was recited to be according to the official plat of the survey of said lands returned to the General Land Office by the Surveyor General, thereby adopting the plat as a part of the instrument."

The words "Navigable Lake," having been inaccurate, the inaccuracy could be and was shown. It was an error

that was open to evidence. (*Stringer* v. *Lessee of Young*, 3 Peters, 320; *Hardin* v. *Jordan, supra.*)

If the government had made the lake *navigable,* it would have done a great favor. One of the plaintiffs in error thought of cutting a canal through it, but it is more fit for railroads than for a canal; two of such railroads crossing it, as the record shows. Before making sale of the subdivisions bordering the lake the United States could, undoubtedly, have sectionized and sold the portion that was originally a lake, and this because the lake was not navigable, but the United States did not choose to do so because such was not its policy, nor would such policy have harmonized with the more reasonable course which the government found to be necessary for the encouragment of settlements.

Nobody in the early times when this fractional township was surveyed, before the Indians had been fully removed from this section of Illinois, would have been willing to buy one of the small legal subdivisions, if limited to it without having any rights in respect to the lake. Anyone buying took title under the description of the legal subdivisions, as always in the government sales, unless otherwise provided; the government, however, making no charge for the land under the water. The grantee of the government took whatever the situation in fact entitled him to take; and if the state at that early time had wished to disturb him by making a claim of the lake, can there be any question that its claim would have failed, when predicated on the mistake of marking on the plat "Navigable Lake"? If claim by the state against the United States would have been unavailing, would it not be so as to a claim by the state against the grantee of the United States? Such grantee took all

the rights of the United States, whatever they were, in the property as including position on the lake, whatever it might be, and found the lake to be, as no doubt the government had found it to be, non-navigable.

There can be no suggestion from the field notes, or otherwise, that the surveyor so examined the lake hydrographically as to be authorized to call it "navigable," nor it is submitted, does it seem to be just to allow the case to be determined upon a mistake so palpable; a mistake which the decree justly nullified; a mistake, too, which has never been made the basis for a claim either by the State or the United States.

V.

Finally, while much more should have been said in fewer words, so, too, as to have woven into a narrative some points of history connected with the public land system under which Illinois as a part of the original north-west territory has grown, the occasion forbids extended argument. Yet no less can be said than that the principles involved are highly important. The case, to be sure, presents a question of title, the foundation of which ought to be sure and secure. The question should be resolved by faithful adherence at every step, to the common law, and not be determined by a chance expression, as if that has become unalterable law or "established almost without argument." The chance expression is not the polar star. Calling a non-navigable lake a meandered lake or anything else but a non-navigable lake, does not make it otherwise than it is; and therefore should neither divest title to it nor put it in ward as being controlled by a trustee.

While the United States held title its power to dispose of the property which is the whole subject of this litigation was plenary. The State was not, at that stage of affairs, a trustee as to any part of the property; no more so in law as to what was the lake than as to what was land unsubmerged. Since the lake was not a navigable body of water, it was not affected by any right of sovereignty on the part of the State of Illinois. Such sovereignty did, of course, apply to Lake Michigan and the waters of the state which were navigable in fact or were made navigable by Act of Congress. But no Act of Congress made this lake navigable, and no other human power could do so.

Jourdan v. *Barrett, supra.*

As the State was not proprietor, nor a trustee, when the United States owned the property, speaking both of land and water, neither did the State become proprietor when private ownership occurred through the issuing of a patent from the United States. The interest of the State in the property, as property, or in its sovereign capacity, was not enlarged by the issuing of a patent to a private individual.

The construction of such patent, so far as it needs construction, should be according to the principles of the common law. Such principles long antedated the admission of Illinois into the Union, and never lost existence through any act of the United States, nor could they be set aside by the words of any court. By such principles the lake was a private water, under the sensible classification of the common law applied to such bodies of water. A law of the State, if there had been such, to make it a public body of water would have been ineffectual; not less

ineffectual, we must say, when the United States parted with some or all of the property than when the United States owned every foot of it. Hence no phrase of any of the courts as to "state law" or "local law" should be permitted to change the common law classification, nor to change the rules of construction which were a part of the common law and in accord with which the lake was a boundary. The meander line was not a boundary. No court can now pretend it was; and when the various steps taken by the government to bring the land into market were taken, the State had no right to say so much, and no more, of what the government has for sale can become private property, and the rest will be held by the State in trust for all the people.

It was not property apportionable in proportion to accretions.

Claim of title by the State before the government of sale would have been inadmissible, and so likewise would have been a claim of title in trust through sovereignty. At each and every stage or period of time such intermeddling by the State would have been unauthorized.

As it is a case which should be governed by a law, that is to say, the common law applicable when the United States issued the patents, so it is a case in which no discrimination as to title should be made in the construction of the patents between land or water in Indiana and land or water in Illinois; the patents making no difference, and the fact that in one case a State was the patentee not making any difference in law in the construction of the patents.

This is a case involving proprietorship as to the whole property, which proprietorship does not concern sov-

ereignty, because the former lake was not and is not navigable, and therefore it is not a case to which the law of accretions can consistently be applied.

The case of *Hardin* v. *Jordan* received mature consideration. Great credit is due to the late Mr. Justice Bradley and to the other members of the court for the thoroughness of investigation displayed in that case, and for the eminently just and statesmanlike opinion given. No such chance expression as "State law" was the basis of decision in that case. This is remarked, not as signifying any slight upon any decision of a state court; far be it from the undersigned to intimate anything to the disparagement of decisions of the state courts in their sphere; all may be necessary to be considered in passing upon a common law case. But, as already remarked, this court did especially and particularly consider and follow the common law, as the Supreme Court of the state had done up to that time in all cases where a question really arose under the common law, and as the same court has continued to do, save in this case and a later case.

The government would have been constrained by the deed of cession from Virginia, based on the Act of Virginia of Oct. 20, 1783, to dispose of the lands faithfully, treating the fund arising therefrom "as a common fund for the use and benefit of such of the United States" as at the date of the deed had become or should "become members of the confederation."

Illinois would have no more right, legally speaking, to any of these ceded lands than Indiana or Maine. The United States acted for all, but with a beneficent care for the promotion and encouragement of actual settlement. In its proprietary interest the "United

States" was much more than a "private owner;" nor does it seem that it could ever be placed in that category except by a kind of metaphor when having sold off the public lands it receives authority from the State to take and hold certain lands for forts, arsenals and public buildings.

But returning to the point of consideration of the relation in which the United States held the public lands and offered them for sale: It so offered them as to encourage the encountering of perils and hardships incident to pioneer life, that homes might be made in the wilderness, to be protected, it might be, by the power of the government. The offer was on a basis of equality, and as the Ordinance of 1787 (Articles I and II) provided, with an assurance of freedom in respect to worship or religious sentiments, and the further assurance, among other things, "of judicial proceedings according to the course of the common law."

There was a solemn guaranty, freely adopted by the new states, as they were formed, that the new states should never interfere with the primary disposal of the soil by the United States in Congress assembled, nor with any regulations Congress might find necessary for securing the title of such soil to the *bona fide* purchasers.

Under the general laws which applied to the whole Northwest Territory, in all its parts, and to the public domain after the new states were formed, it certainly could not have been intended, nor expected, that the settler on the banks of Wolf Lake should obtain less right, in the purchase from the United States of a legal subdivision on the Illinois side of the lake, than would his neighbor, possibly his next door neighbor, in the purchase of a like legal subdivision adjoining the same lake, but on the

Indiana side, nothing but the State line dividing the subdivisions, and each having been first offered at public auction, and thereafter having been held by the United States until sold to such purchasers at the government price, at private sale.

This court was in *Hardin* v. *Jordan* first called upon to decide the real question here involved.

This was also before the State Court had occasion to consider that question. The presentation here *was fuller than in the state court*, and we submit there is no occasion to retract the decision which this court reached. Besides being first, as well as just, it was made, also, at the instance of the present defendant in error, as grantee of Mitchell, as much as at the instance of the first named plaintiff in error.

This court in *Hardin* v. *Jordan* honored and followed the common law, and had the prerogative right to determine the effect of the government patents. The decision was made, also, upon the same state of facts as those shown in this case.

The earlier decision should not be snuffed out, as if it were a dipped candle. Its pure light should not be hid under a bushel.

Questions as to the right of repose, and as to the propriety of disturbing what seemed to be put at rest many years ago, well up strongly, but can only be breathed.

And in making this application most respectfully, your petitioners will ever pray, etc.,

GERTRUDE H. HARDIN,
THE COOK COUNTY LAND AND DOCK COMPANY,
By THOMAS DENT,
Their Solicitor.

I, Thomas Dent, do hereby certify, as counsel for said plaintiffs in error, that the foregoing petition for a rehearing is presented in good faith, and in my judgment for good cause, for the promotion of justice, and not for delay.

THOMAS DENT,
Of Counsel.